

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANITA M. RUSSELL
Claimant

VS.

TYSON FRESH MEATS, INC.
Self-Insured Respondent

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Docket No. 1,043,474

ORDER

Claimant appeals the April 10, 2009, Order Denying Medical Treatment of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was denied benefits in the form of requested medical treatment after the ALJ determined that claimant had failed to give timely notice of her alleged accident.

Claimant appeared by her attorney, Beth Regier Foerster of Topeka, Kansas. The self-insured respondent appeared by its attorney, Wendel W. Wurst of Garden City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held April 6, 2009, with attachments; the transcript of the Evidentiary Deposition of Derek Kuhlman taken April 9, 2009; and the documents filed of record in this matter.

ISSUES

1. Did the claimant meet with personal injury by accident through a series of injuries ending on September 9, 2008? This issue was not decided by the ALJ. Once the issue of notice was determined against claimant, no other issues were considered or determined by the ALJ.
2. Did claimant provide notice of this series of accidents in a timely fashion?
3. If notice was not given within ten days, was there just cause for this failure, sufficient to allow the filing time limit to be extended

to 75 days? In order to properly determine both notice and just cause, the Board must determine the appropriate date of accident pursuant to K.S.A. 2008 Supp. 44-508(d).

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order Denying Medical Treatment should be reversed and the matter remanded to the ALJ for a determination of the remaining issues, including whether claimant suffered an accidental injury which arose out of and in the course of her employment with respondent.

Claimant had worked as a tannery supervisor for several years for respondent. She began developing pain in her upper extremities, including her shoulders, while working on the line, pulling hides out of a brine pool. Claimant's last day performing these duties was on September 9, 2008. Claimant had a meeting with her immediate supervisor, Derek Kuhlman, and the plant manager, Brian Bernard, on that date regarding claimant's productivity. Claimant testified that she told both Derek and Brian about a rash she had developed and about her shoulder pain. However, Derek denied being advised of any shoulder problems or rash during the meeting. Brian did not testify in this matter.

Claimant did not initially seek medical treatment for her problems, believing that the pain in her shoulders would improve with the use of a green ointment which she identified as being like Biofreeze. The use of the ointment did not improve her shoulders, and in October 2008, she contacted the nurses' station at respondent's plant seeking medical treatment. When no referral occurred, claimant went to the plant on October 14, 2008, and filled out an Injury/Illness Information sheet describing the pain in her upper extremities. She also identified the job of pulling hides as the cause of the shoulder pain. The ALJ, in the Order Denying Medical Treatment, on April 10, 2009, denied claimant's request for medical treatment finding that claimant had failed to give timely notice of the accident. However, no determination as to the date of accident was reached by the ALJ. The E-1, Application For Hearing, filed with the Division of Workers Compensation on December 18, 2008, alleged a series of accidents to September 9, 2008, as the date of accident.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board

is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.¹

While the issue of whether claimant suffered an accidental injury which arose out of and in the course of her employment with respondent was raised to the ALJ, it was not determined by the ALJ. As such, the Board will not consider this issue.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.²

The ALJ determined that claimant had failed to provide timely notice of the alleged accidents. However, no determination of the date of accident was ever reached.

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.³

In this instance, claimant was provided no medical treatment until December 2008. Therefore, no determination was made by any authorized physician to remove claimant from work or to restrict claimant from performing her job with respondent. Claimant did provide written notice to respondent of the injury on October 14, 2008. Therefore, under K.S.A. 2008 Supp. 44-508(d), the appropriate date of accident would be the date that the written notice was first provided, on October 14, 2008. Any notice provided on that date would be timely.

¹ K.S.A. 2008 Supp. 44-555c(a).

² K.S.A. 44-520.

³ K.S.A. 2008 Supp. 44-508(d).

As the ALJ did not determine whether claimant had suffered an accidental injury on the dates alleged, this matter will be remanded to the ALJ for a determination of that issue and any other preliminary matters which may arise.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Order of the ALJ denying claimant medical benefits for her failure to provide timely notice of the alleged accident is reversed and the matter remanded to the ALJ for additional proceedings consistent with this order.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order Denying Medical Treatment of Administrative Law Judge Pamela J. Fuller dated April 10, 2009, should be, and is hereby, reversed and the matter remanded to the ALJ for additional proceedings consistent with this order.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

HONORABLE GARY M. KORTE

c: Beth Regier Foerster, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

⁴ K.S.A. 44-534a.